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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WESTERN COAL TRAFFIC LEAGUE,

Petitioner,

v.

SURFACE TRANSPORTATION BOARD AND UNITED STATES OF AMERICA, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT ASSOCIATION OF AMERICAN RAILROADS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Louis P. Warchot
Senior Vice President and General Counsel
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2502

Arvid E. Roach II
Counsel of Record
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044-7566
(202) 662-5388

Counsel for Respondent Association of American Railroads

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QUESTION PRESENTED

Whether the Court of Appeals was correct in upholding decisions of the U.S. Surface Transportation Board that reaffirmed longstanding legal rules applicable to rail rates and routes and rejected a theory of "bottleneck"-rates-on-demand – a newfound theory, admittedly advanced by the complainant shippers as a "creative rate reduction strategy," which was at odds with statute and precedent and would have re-regulated the railroads, undermining two decades of rail-industry financial progress under the deregulatory and marketplace thrust of the Staggers Rail Act of 1980.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Association of American Railroads ("AAR") respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at 169 F.3d 1099 and is reprinted in the Appendix to the Petition ("Pet. App.") at A-1 to A-23.

This is the quintessential case that does not merit review on certiorari. The U.S. Surface Transportation Board, after a thorough review of the complex law governing railroad rates and routes, reaffirmed that law, as relevant here,[1] and rejected a newfound theory of "bottleneck"-rates-on-demand which was admittedly advanced by the complainant rail shippers as a "creative rate reduction strategy." *MidAmerican Energy Co. v. STB*, Nos. 97-1081, *et al.* (8th Cir.), Joint Brief of Petitioners Western Coal Traffic League and the National Industrial Transportation League, June 16, 1997, p. 4. That theory was at odds with statute and precedent. It would have re-regulated the railroads and undermined two decades of rail-industry financial progress since the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895.

There is no need for this Court to wade into the thicket of railroad rate and route law by exercising its review authority in this case. There is no split between the circuits with regard to the Board's holdings. Those holdings have not spawned extensive litigation – to the contrary, the present

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[1] The one new exception that the Board created – involving contract rates – was found by the court of appeals not to be ripe for review. Petitioner has not challenged that finding, and that aspect of the Board's decision is accordingly not before the Court.

case remains the *only* one raising these issues. This is hardly surprising, since the Board's holdings present no legal departures or novel legal questions, but simply reaffirm long-established law, much of it dating to early in the century. No one's ability to conduct their affairs with a clear understanding of the applicable law is frustrated by the lack of a new Supreme Court decision addressing these issues. The Board's decisions are well-reasoned, and arise in the highly technical area of ratemaking where the Board's specialized expertise is greatest and most deserving of deference. *See, e.g., Burlington Northern R.R. v. STB*, 114 F.3d 206, 210 (D.C. Cir. 1997). *See generally Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (broad deference appropriate where agency decision "necessarily require[s] significant expertise and entail[s] the exercise of judgment grounded in policy concerns") (internal quotation omitted).

Nor, as Petitioner asserts, did the Eighth Circuit base its affirmance on an improper ground. The court of appeals sustained the Board's conclusions that the shippers' "bottleneck" rate rule was contrary to multiple statutory provisions and extensive decisional precedent, including Supreme Court precedent which was properly interpreted and applied by the Board and the circuit court. The court also did not err in placing weight on the potential harmful impact of the shippers' proposed "bottleneck" rule on the ability of railroads to earn adequate revenues to continue to provide efficient rail service. Under 49 U.S.C. § 10704(a)(2),[2] the

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[2] The Interstate Commerce act was recodified effective January 1, 1996. Since the recodification did not affect the substance of the provisions at issue here, we use current section numbers, though, as Petitioner notes (Petition at 3), it appears that the three specific rate cases joined by the STB in the *Bottleneck* proceeding are governed by the pre-recodification provisions. Pre-1996 section numbers are noted in the Table of Authorities.

STB must act to ensure railroad revenue adequacy. And while the Board found other legal bases fully sufficient to justify rejecting the shippers' "bottleneck" rate rule, the record contained uncontradicted proof that the rule's potential revenue impact was devastating, and two of the three Board members stressed that revenue adequacy was a central element in their decision of the case.

Accordingly, the petition for a writ of certiorari should be denied.

COUNTER-STATEMENT OF THE CASE

As Petitioner does not accurately state what was decided below or the grounds for decision, we present the following Counter-Statement of the Case. The inescapable complexity of the issues means that this statement must be of considerable length, but we have endeavored to make it as brief and clear as possible.

A. Some Terms Defined

It is helpful to define some terms at the outset.

A *through movement* is a movement of rail traffic from an origin on one railroad to a destination on a different railroad. The point at which the first railroad transfers the traffic to the second is known as an *interchange point*.

A *through rate* is the rate for a through movement. It can take two forms: a *joint rate*, which is a unitary or *single-factor* rate covering a through movement by two or more carriers that agree privately on how to divide the revenue between themselves (their *divisions*); or a *combination rate*, which is a rate composed of separate *factors* provided to the shipper separately by different railroads and used together to cover the through movement. The factors in a combination

rate are commonly either *proportional rates*, which are rates available only for use in conjunction with other rates of connecting carriers to create a through rate for a through movement, or – only if the railroads publishing them specifically indicate that they are available to move through business – *local rates*, which are rates applicable to movements between two points on a railroad's own lines. *See Through Routes & Through Rates*, 12 I.C.C. 163, 166-67 (1907); *Metropolitan Edison Co. v. Consolidated Rail Corp.*, 5 I.C.C.2d 385, 402 (1989).

Rail rates can be common-carrier rates or contract rates. A *common-carrier rate* is a published rate, generally for the movement of a specific commodity between specific points, which is not the subject of a contract between the carrier and the shipper. Until 1995, common-carrier rail rates were required to be on public file at the ICC in the form of tariffs. The tariff filing requirement was eliminated in 1995, but railroads are still required to provide common-carrier rates on request to the extent necessary to move any shipment from origin to destination. *See* 49 U.S.C. § 11101; 49 C.F.R. pt. 1300. A *contract rate*, as the name suggests, is a rate that is the subject of a contract between the carrier and the shipper. Since 1980, the Interstate Commerce Act has permitted contracting with few restrictions. 49 U.S.C. § 10709. Rail transportation contracts are enforceable like other private contracts, and are not subject to challenge as contrary to the rail regulatory provisions of the Interstate Commerce Act. 49 U.S.C. § 10709(c).

A railroad exclusively serving a point is often referred to as the *"bottleneck" railroad*, and a rate for the movement of traffic by that railroad between that point and a point where the traffic is interchanged with another railroad to complete the through movement is often referred to as a *"bottleneck" rate*. Notwithstanding its invidious overtones, this terminology connotes nothing more than that the railroad

serving the point is the only railroad serving that point, and that there is another railroad (called the *"upstream" railroad* if the bottleneck is at destination, or the *"downstream" railroad* if the bottleneck is at origin) that could move the traffic part of the way between the origin and the destination in conjunction with the "bottleneck" railroad.

B. The *Bottleneck* Proceeding

1. The Board's Request for Comments

In August 1996, the Board issued an order inviting comments on common questions of law and policy that were raised by three railroad rate cases. Docket Nos. 41242, *et al.*, *Central Power & Light Co. v. Southern Pacific Transportation Co.*, Decision served Aug. 23, 1996, at 10. Each of the three cases had been brought by an electric utility company in regard to one or more rates for the transportation of coal in unit trains from a coal mine to a coal-fired electric generating plant. In each case, the destination plant or plants were served by only one railroad. In each, the shipper sought to compel the railroad that served the plant to provide a separate rate for the transportation of the coal from a point of interchange with another railroad to the plant. The shipper asserted that it was entitled to challenge that "bottleneck" segment rate separately for maximum reasonableness, as if it were a separate origin-destination rate. The shipper also asserted that it had the right to secure a separate segment rate from an "upstream" carrier to move the coal from the origin to the interchange point with the "bottleneck" carrier, and that once these two segment rates were in place the two railroads would be obliged to carry out the transportation as a coordinated through movement.

In two of the three cases, the "bottleneck" railroad had its own long-haul route from the origin to the destination. In those cases, in seeking a segment rate from the

"bottleneck" railroad that could be used in conjunction with a routing via a different origin railroad, the shipper was seeking to force the "bottleneck" railroad to "short-haul" itself – that is, to accept a routing that gave it a much shorter length of haul than its potential long haul.[3]

In the third case, the shipper was seeking rates for potential movements of coal from mines located on two different "upstream" railroads. The shipper sought to require the "bottleneck" railroad to provide segment rates to the destinations from interchange points with the "upstream" railroads. The shipper wished to force the "upstream" railroads to compete against each other for each movement, and then to use the pertinent "bottleneck" rate in conjunction with the origin-to-interchange-point rate of the winning "upstream" railroad to move the coal to destination. In this case, the "bottleneck" railroad had no potential longer haul for any of the particular movements than the "bottleneck" segments for which the shipper was seeking to compel the publication of separate rates.

In none of the three cases did the shipper have a contract with an "upstream" railroad for the movement of the traffic from the origin to the desired interchange point with the "bottleneck" carrier.

In each of the three cases, the defendant railroads had moved to dismiss. They had argued that while the law provides that railroads must make routes and furnish rates to move any shipment from origin to destination, a railroad is not obliged to provide a shipper with separate, and separately challengeable, rates for any segment of a through movement

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[3] The situation in one of these cases was actually more complicated than this because of a settlement agreement in another case, but that refinement is not material here.

that the shipper may choose. Rather, under 49 U.S.C. § 10701(c), railroads are entitled to what is known as the "rate and route initiative" – which means that they are entitled in the first instance to specify the form that a through rate will take (*e.g.*, whether the rate shall be a joint or combination rate, and, if combination, whether the factors shall be proportional or local rates), and the point of interchange if more than one railroad is involved in the movement. So long as the shipper is provided a rate to move the traffic from the origin to the destination, the shipper cannot insist on a different form of rate or on different points of interchange, except in limited circumstances where a railroad has foreclosed the use of a route that is clearly more efficient than the one to which the existing through rate applies. 49 C.F.R. § 1144.5 (Competitive Access Rules). Also, under 49 U.S.C. § 10705(a)(2), a railroad generally cannot be forced to "short-haul" itself by participating in an interline rate with another railroad via a nearby junction in lieu of a longer haul over its own lines. And, under longstanding precedent, the maximum reasonableness of a through rate can only be challenged on a through basis: the separate factors that make up the through rate cannot be separately challenged. *E.g.*, *Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 234 (1925).

In its August 1996 order, the Board invited comments from all interested persons on the legal and policy issues posed by the three cases. A central issue that the Board identified for comment was the continued vitality of the longstanding rule that a through rate can be challenged only on a through basis. That rule is essential to the regime of maximum rate regulation that the ICC adopted after extended consideration in the 1980s in *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520 (1985), *aff'd sub nom. Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987). That regime, which flows from the deregulatory, market-based thrust of the Staggers Rail Act of 1980, allows

railroads to price "differentially," that is, to charge higher mark-ups on traffic that has fewer transport alternatives (low-elasticity traffic) and lower mark-ups on traffic that can readily shift to truck or have recourse to other alternatives (high-elasticity traffic).

The upper constraint on such mark-ups is that rail rates, on an origin-to-destination basis, cannot exceed "stand-alone cost," which is the full cost, including cost of capital, of providing the most efficient service from origin to destination in a hypothetical environment of no barriers to entry or exit. In *Coal Rate Guidelines*, the Commission found that it was critical, if the railroad industry is to have a reasonable opportunity to cover its fixed and common costs and thus be "revenue adequate," to permit railroads to price their low-elasticity traffic up to the level of stand-alone cost on an origin-to-destination basis, insofar as the market permits such pricing. This is true because so much rail traffic faces competition and must move at lower rail rates if the railroad is to compete successfully for handling it. If rates were forced to lower levels, the railroads could not earn enough to reinvest in their physical plant and remain viable. *Id.* at 526-27, 535.[4] The Commission also found that, under a regime of differential pricing constrained by the stand-alone cost test (and certain other constraints that the Commission adopted), no shipper would subsidize any other or be forced to pay an unreasonable rate. *Id.* at 523-24, 549.

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[4] *See also, e.g., Mr. Sprout, Inc. v. United States*, 8 F.3d 118, 124-25 (2d Cir. 1993), *cert. denied*, 512 U.S. 1205 (1994) ("Railroads must charge above fully allocated costs if they are to achieve revenue adequacy and stay in business."); *Potomac Electric Power Co. v. ICC*, 744 F.2d 185, 193 (D.C. Cir. 1984) ("rates necessarily must exceed fully allocated costs if the carrier is to earn adequate revenue"); Ex Parte No. 445 (Sub-No. 2), *Intramodal Rail Competition – Proportional Rates*, ICC Decision served May 2, 1990, at 4 (agency has "consistently recognized that differential pricing is essential to the viability of the industry").

A key question raised by the Board in its August 1996 order was whether the economic viability of the railroads would be threatened if "bottleneck" railroads were forced to quote separate "bottleneck" rates and those rates could be restricted to the stand-alone cost of just the "bottleneck" segment, while rates for the remainder of the haul were bid down to a level determined by head-to-head competition between two or more railroads. The Board said that such a "bottleneck" rate scheme arguably might introduce more competition, in the sense that a part of the through haul would be opened to competing bids, and this might be in keeping with the injunction in the national transportation policy that the Board "allow . . . competition and the demand for services to establish reasonable rates." 49 U.S.C. § 10101(1). On the other hand, the Board questioned whether this would be consistent with the parallel statutory injunctions that it permit railroads to the greatest feasible extent to conduct their business as they choose, free from unnecessary regulation (49 U.S.C. § 10101(2)), and that it "promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues" (49 U.S.C. § 10101(3)). *See also* 49 U.S.C. §§ 10701(d)(2) (in determining rate reasonableness, Board must recognize "the policy of this part that rail carriers shall earn adequate revenues"), 10704(a)(2) (Board "shall make an adequate and continuing effort" to assist railroads in attaining adequate revenues).

2. The Comments

Comments were submitted by numerous parties. The principal comments for the railroad industry were submitted by the AAR. Comments, Oct. 15, 1996. Individual railroads also submitted comments.

The railroad parties' comments reviewed the settled law regarding rail rates and routes, and showed that it was

incompatible with any scheme of mandatory "bottleneck" rates and separate challenges to the levels of such rates.

That legal structure has the following seven essential elements:

First, railroads, as common carriers, are required to provide rates and routes to move traffic, when tendered by a shipper, from any origin to any destination.[5] If it is necessary for more than one railroad to participate in order to get the traffic from origin to destination, the railroads have a legal obligation to interchange the traffic and establish a through route and rate for it.[6]

Second, under the Board's Competitive Access Rules, railroads cannot foreclose interline routes that are more efficient than their own single-line routes by refusing to deal with interline partners or insisting on unreasonably high revenue divisions.[7] On the other hand, they are not required to enter into any interline route a shipper may choose, regardless of its inefficiency.[8]

Third, within these parameters, railroads are, as noted, entitled to the "rate and route initiative" – that is, they

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[5] 49 U.S.C. § 11101(a); *Overbrook Farmers Union Cooperative Ass'n – Violation of 49 U.S.C. § 11101(a)*, 5 I.C.C.2d 316 (1989); other cases cited at AAR Comments, p. 11 n.3.

[6] 49 U.S.C. §§ 10703, 10742; *Routing Restrictions Over Seatrain Lines, Inc.*, 296 I.C.C. 767, 773-74 (1955); other cases cited at AAR Comments, p. 11 n.4.

[7] 49 C.F.R. § 1144.5; *Intramodal Rail Competition*, 1 I.C.C.2d 822 (1985), *aff'd sub nom. Baltimore Gas & Electric Co. v. United States*, 817 F.2d 108 (D.C. Cir. 1987).

[8] *E.g.*, *Vista Chemical Co. v. Atchison, Topeka & Santa Fe Ry.*, 5 I.C.C.2d 331, 341-42 (1989).

are free to specify where they will interchange traffic for an interline movement and the form of the rate (joint, combination of proportionals, combination of locals, etc.) that they will provide to the shipper for the through movement.[9]

Fourth, a railroad's local rate can be used in conjunction with other rates of connecting railroads as a factor in a through rate only if the railroad intends for it to be available for use in that fashion.[10]

Fifth, a railroad is not required to provide a shipper with a separate, and separately challengeable, rate for a segment of a through movement.[11]

Sixth, a railroad cannot be compelled to "short-haul" itself by participating in an interline route over a nearby junction unless the route that would give it a longer haul is clearly less efficient.[12]

And *seventh*, it is only the entire rate for a through movement – regardless of the form of its components or their individual dollar magnitude – that can be challenged for maximum reasonableness. As the Supreme Court stated in the seminal case: "The shipper's only interest is that the joint rate be reasonable as a whole." *Louisville & Nashville R.R.*

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[9] 49 U.S.C. § 10701(c); *United States v. Illinois Central R.R.*, 263 U.S. 515, 522 (1924); other cases cited at AAR Comments, p. 12 n.6.

[10] *Thompson v. United States*, 343 U.S. 549 (1952); *Baltimore & Ohio Southwestern Ry. v. Settle*, 260 U.S. 166 (1922); *Marshall Manufacturing Co. v. Texas & Pacific Ry.*, 29 F.2d 660, 661 (5th Cir. 1928); *Seatrain*, 296 I.C.C. at 774-75, 783-85.

[11] *E.g.*, Ex Parte No. 445 (Sub-No. 2), *Intramodal Rail Competition – Proportional Rates*, ICC Decision served May 2, 1990.

[12] 49 U.S.C. § 10705(a)(2).

v. Sloss-Sheffield Steel & Iron Co., 269 U.S. 217, 234 (1925).[13] As already noted, this rule, commonly referred to as the "through-rate rule," is central to the ability of the railroads to price differentially (subject to the stand-alone cost cap), as endorsed in *Coal Rate Guidelines*, and the governing precedents confirm that the stand-alone cost test is to be applied to the entire through movement.[14]

The railroads further demonstrated in their comments that any scheme of mandatory "bottleneck" rates would impose a pervasive new regulatory regime on the rail industry and gravely impair its financial viability. A large portion of rail shippers are exclusively served. *E.g.*, AAR Comments, Verified Statements of David M. Levan, p. 15, & Richard K. Davidson, p. 14. Expert testimony established that forcing railroads to establish separate "bottleneck" rates for these shippers, and allowing those rates to be separately challenged and restricted to an artificially calculated stand-alone cost for the "bottleneck" segment alone, while subjecting the remainder of the haul to bids by multiple railroads, would cost the rail industry at least $2.4 billion per year and condemn it to chronic revenue inadequacy and ultimate non-viability. *Id.*, Verified Statement of Craig F. Rockey & John C. Klick ("Rockey/Klick VS"), pp. 1-16;

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[13] *See also, e.g., Great Northern Ry. v. Sullivan*, 294 U.S. 458, 463 (1935); *Metropolitan Edison*, 5 I.C.C.2d at 400-10 (thoroughly reviewing precedents, reaffirming the rule that only the through rate may be challenged as excessive, and overriding any ICC decisions to the extent they are to the contrary); other cases cited at AAR Comments, pp. 14-15 n.12. *Metropolitan Edison* rendered the Berry article cited by Petitioner (Petition at 15 n.16) obsolete.

[14] *E.g., Burlington Northern, Inc., & Burlington Northern R.R. – Control & Merger – Santa Fe Pacific Corp. & Atchison, Topeka & Santa Fe Ry.*, 10 I.C.C.2d 661, 753 (1995), *aff'd sub nom. Western Resources, Inc. v. STB*, 109 F.3d 782 (D.C. Cir. 1997); *Metropolitan Edison*, 5 I.C.C.2d at 409.

AAR Rebuttal, Oct. 25, 1996, Reply Verified Statement of Craig F. Rockey & John C. Klick ("Rockey/Klick RVS"), pp. 1-5.

The reason, quite simply, is that where railroads compete head-to-head for traffic all the way from the origin to the destination, rates are only, on average, 106% of variable cost, whereas the industry needs to earn, on average, 150% of its variable cost to cover its high fixed and common costs and remain viable. Rockey/Klick VS, p. 8; Rockey/ Klick RVS, p. 4. It is only through the differential pricing of lower-elasticity traffic on an origin-destination basis that the industry has been able to move toward revenue adequacy. Any scheme of mandatory, separately challengeable "bottleneck" rates would tend to drive nearly all rates down to the revenue-inadequate 106% level, deprive the railroad industry of the capital needed for the continued provision of efficient rail services, and ultimately harm all shippers. AAR Comments, Verified Statement of Robert W. Anestis, pp. 1-27; AAR Rebuttal, Reply Verified Statements of William J. Baumol & Robert D. Willig ("Baumol/Willig RVS"), pp. 1-24, & Robert W. Anestis, pp. 1-8.

This was confirmed by a panel of noted economists (AAR Motion for Leave to File, Oct. 21, 1996, Statement of Economists), and by a panel of the investment bankers who supply capital to the industry (AAR Comments, Verified Statement of Investment Bankers & Securities Analyst). It was further underscored by the testimony of numerous shippers, ports and rail labor unions that feared the consequences for the continued provision and improvement of rail services of such a change in the existing regime of railroad rate regulation. AAR Comments, Tabs 12 through 45; AAR Motion for Leave to File, Verified Statement of Steven R. Dillenbeck. The railroads' expert testimony specifically established that allowing railroads to earn only the stand-alone cost of "bottleneck" segments would not

allow the rail *network* to be self-sustaining. AAR Comments, Verified Statement of William J. Baumol & Robert D. Willig ("Baumol/Willig VS"), pp. 14-22; Baumol/Willig RVS, pp. 4-6. Indeed, the very concept of a separate stand-alone cost for a "bottleneck" segment is meaningless, because no rational investor would construct a "bottleneck" segment in a regulatory regime that precluded the *rest* of the rail network, over which "bottleneck" shipments must move to get from origin to destination, from covering its costs. Baumol/Willig VS, pp. 14-16.

The complainant shippers and their supporters, in their comments, did not offer any studies to dispute the railroads' evidence as to the devastating economic effect on the rail industry of a "bottleneck" rate scheme. Rather, they rested their position principally on two arguments.

First, they asserted that, as a matter of law, shippers were entitled to move their traffic from origin to destination in a series of separate, segment-by-segment "journeys," and to secure separate and separately challengeable local rates from different railroads for each such segment. They claimed that they were not seeking a through rate at all, but only multiple, seriatim rates for unrelated journeys that happened to be end-to-end. *E.g.*, WCTL Comments, Oct. 15, 1996, pp. 12-19. In reply, the railroads showed that well-established law distinguishes between through movements and genuinely separate local journeys on the basis of whether the shipper's actual intent upon dispatching the traffic is to move it all the way from the origin to the destination.[15] The railroads pointed out that if the complainant shippers' theory that every through movement could be disaggregated into

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[15] *See Atlantic Coast Line R.R. v. Standard Oil Co.*, 275 U.S. 257, 267-73 (1927); other cases cited at AAR Comments, p. 31 n.30.

separate journeys were correct, this would effectively repeal most aspects of the law governing railroad routes and rates, including the statutory carrier rate and route initiative, the statutory short-haul provision, the well-established doctrine that a through rate can only be challenged on a through basis and cannot be challenged in segments, and the Board's Competitive Access Rules and the precedents thereunder, which limit shippers' ability to override carrier routing choices to situations involving the clear foreclosure of efficient routes. AAR Comments, pp. 30-32; AAR Rebuttal, pp. 18-21. Though the shippers argued that their "multiple journeys" theory had long been the law, they could not explain why no shipper had brought an action seeking a segment rate on the basis of such a theory in living memory, or why, for example, shippers had expended great time and resources on hard-to-prove cases under the Competitive Access Rules[16] when those cases would have been resolved instantaneously in the shippers' favor if the "multiple journeys" theory were correct.

Second, the complainant shippers argued that a regime of mandatory "bottleneck" rates would further "deregulate" the railroads and promote competition. *E.g.*, MidAmerican Comments, Oct. 15, 1996, pp. 10-13. The railroads replied that a "bottleneck" rate scheme would actually be *re*-regulatory, not *de*regulatory. The structure of the existing rail network has evolved through transportation and capital market decisions, with some transportation

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[16] *See Midtec Paper Corp. v. Chicago & North Western Transportation Corp.*, 3 I.C.C.2d 171 (1986), *aff'd sub nom. Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988); *Vista Chemical Co. v. Atchison, Topeka & Santa Fe Ry.*, 5 I.C.C.2d 331 (1988); *Shenango, Inc. v. Pittsburgh, Chartiers & Youghiogheny Ry.*, 5 I.C.C.2d 995 (1989), *aff'd mem. sub nom. Shenango, Inc. v. ICC*, 955 F.2d 722 (D.C. Cir. 1992).

markets eliciting the construction of multiple competing railroads, and others, with less available traffic, eliciting the construction of only a single railroad. Artificially forcing head-to-head railroad competition into the latter markets through mandatory rate rules would represent the imposition of new regulation, not deregulation. And by ensuring that railroads became non-viable, the "bottleneck" rate scheme would actually destroy, not promote, competition. Competition, to be meaningful, must be sustainable, and the "bottleneck" rate proposal, by forcing exclusively-served rail traffic to be subjected to head-to-head bidding by multiple railroads, would prevent the railroads from covering their costs, and thus undermine genuine, sustainable competition. AAR Rebuttal, pp. 4-7.

3. The *Bottleneck I* Decision

In its Decision served on December 31, 1996 ("*Bottleneck I*") (Pet. App. at B-1 to B-37), the Board agreed with the railroads on most of the issues. It rejected the complainant shippers' "multiple journeys" theory, confirmed that local rates are not available for through traffic unless a railroad specifically so provides, and held that shippers are not entitled to "bottleneck" segment rates on demand. The Board reaffirmed the carrier's right to the rate and route initiative and the continuing validity of the statutory short-haul provision, while also underscoring that it would aggressively enforce the Competitive Access Rules to provide a remedy if railroads insisted on inefficient routes. The Board agreed that the complainant shippers' "bottleneck" rate proposal, and other similar proposals, were *re*-regulatory, not *de*regulatory, and that, subject to the constraints imposed by maximum rate regulation, railroads are entitled to price differentially from origin to destination. *Bottleneck I* at 5-11, Pet. App. at B-9 to B-20.

The Board also reaffirmed that through rates must be challenged on a through basis. *Id.* at 11-13, Pet. App. at B-20 to B-23. However, the Board created a new exception to this longstanding rule. The Board held that if one factor in a through rate is a *contract* rate, and the other factor is a common-carrier rate, the Board would consider the maximum reasonableness of the common-carrier factor separately, as if it were an independent origin-to-destination rate. *Id.* at 13-14, Pet. App. at B-23 to B-25. The Board rested this holding on 49 U.S.C. § 10709(c)(1), which provides: "A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part." Since, the Board said, this provision deprived it of "rate reasonableness jurisdiction" over rail transportation contracts, it was precluded from considering the level of an entire through rate where one factor in such a rate was a contract rate. *Bottleneck I* at 13, Pet. App. at B-24.

The Board dismissed all three of the pending cases insofar as they sought the prescription of "bottleneck" rates. *Id.* at 14-18, Pet. App. at B-26 to B-31. The Board's holding regarding contracts was of no consequence in any of the three cases, because, as noted, none of them involved a contract rate factor.

4. The *Bottleneck II* Decision

One of the complainant shippers, MidAmerican Energy, then filed a petition for clarification, asking the Board to elaborate on its contract ruling. Even though MidAmerican's case did not involve a contract rate factor, nor did either of the other cases before the Board, MidAmerican asked the Board to answer a number of questions regarding the obligations of railroads to provide

rates under various scenarios involving contract rate factors, and how rate challenges would be entertained in those circumstances. MidAmerican Petition for Clarification, Jan. 21, 1997.

In its Decision served on April 30, 1997 ("*Bottleneck II*") (Pet. App. at C-1 to C-24), the Board responded to MidAmerican's queries, and expanded on the contract holding in *Bottleneck I* in a critical respect. In *Bottleneck I*, the Board had said that *if* a through rate was composed of a contract rate factor and a common-carrier rate factor, the reasonableness of the common-carrier rate factor would be evaluated separately. In *Bottleneck II*, the Board now went on to address a "bottleneck" carrier's obligation to *cooperate* in creating such a situation, notwithstanding its right to the rate and route initiative under 49 U.S.C. § 10701(c).

The Board said that if a "bottleneck" carrier that did not serve both ends of a movement was presented with a contract between the shipper and an "upstream" railroad for transportation of the traffic between that end of the movement and an interchange point – and assuming that, where alternative interchange points between the two railroads were available, any dispute as to the location of the interchange was resolved by agreement or a decision of the Board – the "bottleneck" carrier would be *compelled* to provide a common-carrier rate factor for the "bottleneck" segment for use in conjunction with the contract rate factor to create a through rate. *Bottleneck II* at 9-10, Pet. App. at C-15 to C-16. The Board rejected AAR's argument that in at least some cases the appropriate remedy should be for the Board to prescribe a joint rate for the entire through movement and establish a reasonable division of the through revenue between the carriers pursuant to 49 U.S.C. § 10705(a). *Bottleneck II* at 11, Pet. App. at C-17. The Board said it foresaw "little likelihood" of granting the prescription/division remedy suggested as an alternative by AAR –

and its ultimate holding rejecting that remedy was unequivocal. *Id.*

In concurring statements to the *Bottleneck* decisions, two of the three Board members stressed that, in deciding the cases as they had, they had taken particular care to balance the Interstate Commerce Act's desideratum of revenue adequacy against pro-competition policies reflected in the statute. *Bottleneck I* at 19, Pet. App. at B-35 (Owen, Commissioner); *Bottleneck II* at 14, Pet. App. at C-21 to C-22 (Morgan, Chairman).

5. The Eighth Circuit Appeals

Both the shippers and the railroads appealed the two *Bottleneck* decisions. The Eighth Circuit affirmed, as against the shipper appeals, the STB's rejection of a general right to "bottleneck" segment rates on demand, expressly relying on the Board's reasoning and expertise in all respects. The court found the railroads' cross-appeals on the contract holdings of the two decisions not to be ripe, and dismissed them, leaving those issues to be raised in a case in which the contract holdings were actually relied upon to grant relief against a railroad. Such a case is pending in the D.C. Circuit. *Union Pacific R.R. v. STB*, No. 98-1058 (D.C. Cir., *appeal docketed*, Feb. 9, 1998).

REASONS FOR DENYING THE WRIT

The reasons for denying a writ of certiorari in this case are manifold.

A. No Circuit Split

There is no conflict among the circuits with regard to the *Bottleneck* holdings tendered for review here. Indeed, no

other case has arisen in more than two years that presents those issues.[17]

B. No New Law

That the holdings under challenge have spawned no litigation in over two years, save the present review proceeding, is hardly surprising, for those holdings made no new law, but rather simply reaffirmed longstanding statutory and case law.

The Eighth Circuit held: "Nothing in the Act explicitly requires carriers to provide separate local rates for bottleneck service." 169 F.3d at 1109, Pet. App. at A-23. Such a regime of "bottleneck"-rates-on-demand would be incompatible with the core statutory provisions pertaining to rail rates and routes, including the rate-and-route-initiative provision (49 U.S.C. § 10701(c)) – which in turn reflects the critical statutory goal of "allowing railroads to achieve revenue adequacy by competing on a free-market basis" – and the short-haul provision (49 U.S.C. § 10705(a)(2)). 169 F.3d at 1104-05, 1106, Pet. App. at A-12 to A-13, A-16 to A-17. It would also effectively render moot the Board's Competitive Access Rules, under which the Board will mandate new through routes only where there is anticompetitive conduct, and not simply on demand. *Id.* at 1108-09, Pet. App. at A-22.

It was the *shipper complainants*, with their "multiple journeys" theory, that would have created new – and untenable – law, by effectively repealing these statutory and regulatory provisions, reading a "bottleneck"-rates-on-

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[17] The *Union Pacific* case just cited presents issues *not* presented here, because the Eighth Circuit found them not to be ripe, a finding that Petitioner does not challenge.

demand provision into the statute that is not to be found in it, and redefining the common carrier obligation in a manner at odds with the "significant limitations" that the statute imposes on shippers' rights to dictate the routes and rates they are provided to move their traffic from origin to destination. *Id.* at 1106, Pet. App. at A-16. The shippers' claim of a right to separately-challengeable "bottleneck"-rates-on-demand would also have effectively overruled decades of case law, including binding Supreme Court precedent, that provides that through rates may only be challenged on a through basis because the overall level of the through rate is the only matter in which the shipper has a legitimate interest (the "through-rate rule"). *E.g.*, *Great Northern Ry. v. Sullivan*, 294 U.S. 458 (1935), cited at 169 F.2d at 1106, Pet. App. at A-16.

C. The Eighth Circuit Did Not Improperly Stress Revenue Adequacy

In every one of its holdings just described, the Eighth Circuit was sustaining points on which the Board had relied. Thus, the Board, like the court, noted the absence of any "bottleneck" rate requirement in the Interstate Commerce Act (*Bottleneck I* at 8, Pet. App. at B-13); noted the incompatibility of such a requirement with the rate-and-route-initiative provision (49 U.S.C. § 10701(c))[18] and the short-haul provision (49 U.S.C. § 10705(a)(2)) of the statute (*Bottleneck I* at 8, Pet. App. at B-13 to B-14; *Bottleneck II* at 3-5, Pet. App. at C-4 to C-8); noted the incompatibility of such a requirement with its Competitive Access Rules

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[18] Which, contrary to Petitioner (Petition at i, 13), is *not* a "new exception," but has been the law for many decades. *See, e.g.*, *United States v. Illinois Central R.R.*, 263 U.S. 515, 522 (1924); *ICC v. Louisville & Nashville Ry.*, 227 U.S. 88, 92 (1913).

(*Bottleneck I* at 6-11, Pet. App. at B-11 to B-20); held that the shipper position misinterpreted the common carrier obligation (*Bottleneck I* at 4-5, Pet. App. at B-8 to B-9); and found that a regime of "bottleneck"-rates-on-demand could not be squared with the through-rate rule, which is grounded in binding Supreme Court precedent (*Bottleneck I* at 11-13, Pet. App. at B-20 to B-23; *Bottleneck II* at 4, Pet. App. at C-6).

Despite these many respects in which the Eighth Circuit closely tracked, in its grounds for affirmance, the reasoning of the Board, Petitioner argues that the court placed too much reliance on the need to ensure revenue adequacy, a rationale supposedly disclaimed by the Board. But the Board did not disclaim such a rationale; it only declined to rule on the accuracy of the railroads' projections as to the revenue loss that the shippers' "bottleneck" rate proposal would cause, and opined that it did not "expect *our decision here*" – which, of course, *rejected* the shippers' proposal – "to produce the type of revenue disruptions projected by the railroads." *Bottleneck I* at 12 n.21, Pet. App. at B-21 n.21 (emphasis added).[19] The Board did not deny that revenue adequacy would be cast in question by a regime of "bottleneck" rates – indeed, that was a central consideration that the Board had adverted to in joining the three shipper rate complaints and framing the *Bottleneck* proceeding[20] – and two of the three Board members stressed

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[19] The Board was in error in suggesting that there were competing revenue impact studies in the record. In fact, the railroads presented the *only* such study, which should have been adopted as uncontested.

[20] *See* Docket Nos. 41242, *et al.*, *Central Power & Light Co. v. Southern Pacific Transportation Co.*, Decision served Aug. 27, 1996, p. 9; *see also Bottleneck I* at 3, Pet. App. B-5 to B-6 (railroads' concern that "segmented rate reasonableness determinations on trough movements would . . . directly threaten the industry's ability to price differentially and recover its full costs, and thereby defeat Congress' directive to 'promote a (...continued)

that in deciding the case, they balanced revenue adequacy considerations against the pro-competitive goals of the statute. *See Bottleneck I* at 19 [illegible]t. App. at B-35 (Owen, Commissioner); *Bottleneck II* at [illegible], Pet. App. at C-21 to C-22 (Morgan, Chairman).[21] Thus, while the Eighth Circuit was inaccurate in describing the Board as explicitly balancing revenue adequacy against other considerations in the body of the Board opinion proper, it was clearly correct in viewing revenue adequacy as an important factor in the Board's decisions. The Eighth Circuit's opinion is certainly not worthy of Supreme Court review simply because of this relative nuance with regard to the multiple and overlapping grounds for affirmance.

D. The Board Did Not Misconstrue Supreme Court Precedent

Petitioner finally argues (Pet. at 9) that "constructions and applications of [this] Court's authorities . . . lie at the heart of this case," and that the Eighth Circuit erred in failing to correct erroneous STB "constructions and applications" of several Supreme Court decisions. Petitioner is wrong on both counts.

First, most of the numerous bases for the Board's – and the Eighth Circuit's – rejection of a regime of separately-challengeable "bottleneck"-rates-on-demand rested on statutory provisions (the route-and-rate initiative and short-haul provisions), regulatory provisions (the Competitive Access Rules), or decisional precedents of the Board and its

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safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues'") (quoting 49 U.S.C. § 10101(3)).

[21] The point was also stressed in the STB's brief in the Eighth Circuit (at pp. 1-2, 24-26).

predecessor the ICC (the grounding of the through-rate rule in *Metropolitan Edison Co. v. Consolidated Rail Corp.*, 5 I.C.C.2d 385, 401-10 (1989), which exhaustively reviewed the precedents in this area and overruled any precedents contrary to its holding that the rule applied regardless of the form of the rate in question; and the grounding of the Board's rejection of the shippers' "multiple journeys" theory in *Routing Restrictions Over Seatrain Lines, Inc.*, 296 I.C.C. 767 (1955)). *Only* a *part* of the grounding of two of those decisional bases was provided by Supreme Court decisions: (1) part of the grounding for the through-rate rule rested on Supreme Court precedent, particularly the *Great Northern* case; and (2) part of the grounding for rejection of the shippers' "multiple journeys" rule rested on Supreme Court precedents such as *Baltimore & Ohio Southwestern Ry. v. Settle*, 260 U.S. 166 (1922), and *Thompson* v. *United States*, 343 U.S. 549 (1952). Thus, as these Supreme Court opinions, important as they are, provided only cumulative support for the pertinent bases of decision, the Eighth Circuit was not obligated to review extensively in its opinion all the details of the debate as to their correct interpretation.

Second, and more fundamentally, the STB did not err in interpreting these Supreme Court decisions.

- Rejecting the same shipper arguments that Petitioner advances here, the Board very clearly explained in *Bottleneck I* at 12-13, Pet. App. B-21 to B-22, why *Great Northern* was not inapplicable to proportional rates and could not be restricted to rate prescription as distinguished from reparations, and why *Atchison,*

Topeka & Santa Fe Ry. v. United States, 279 U.S. 768 (1929), was not to the contrary.[22]

- The Board also rejected the shippers' effort to consign cases like *Settle* and *Thompson* to irrelevance by the vague – and circular – argument that those cases dealt with when a through movement was involved, whereas the shippers supposedly were seeking separate (but coordinated) "local" movements. The whole point of the *Settle/Thompson* line of cases is that a shipper cannot do what these shippers were attempting to do through this argument: dictate whether traffic is shipped in a through movement simply by the labels they unilaterally apply. Rather, if, as was plainly the case here, the shipper's intent when dispatching the traffic is to effect the through transportation of the traffic to destination, the movement is a through movement whether or not the shipper calls it two separate local movements.[23] The Board confirmed this by proceeding directly to, and amply supporting, the dispositive point: that a shipper has no right to insist that what is actually a through movement be handled under separate local rates. *See Bottleneck I* at 4-6, Pet. App. at B-6 to B-10.

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[22] The *Santa Fe* case also, of course, pre-dated *Great Northern*, and did not focus specifically on the through-rate rule, as did *Great Northern*.

[23] The fact that an occasional through movement may occur without a through route and rate being in place (Petition at 14) does not change this. *Denver & Rio Grande Western R.R. v. Union Pacific R.R.*, 351 U.S. 321, 329 (1965).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Louis P. Warchot
Senior Vice President and General Counsel
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2502

Arvid E. Roach II
Counsel of Record
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044-7566
(202) 662-5388

Counsel for Respondent Association of American Railroads

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